Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Developing an Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Link-Up	)	WC Docket No. 03-109

COMMENTS OF XO COMMUNICATIONS LLC

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COMMENTS OF XO COMMUNICATIONS LLC

XO Communications LLC ("XO" or the "Company"), through counsel, hereby provides its Comments in response to the Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking (the "*Notice*" or "*NPRM*") issued by the Federal Communications Commission (the "FCC" or "Commission") in the above-captioned proceeding on February 9, 2011. Separate comment cycles were established with respect to issues discussed in Section XV of the Notice and all other issues raised therein. These comments respond to the request for comment on the matters raised in Section XV of the *Notice*.

SUMMARY

XO commends the Commission for once again tackling the thorny twin problems of intercarrier compensation and Universal Service Fund ("USF") reform. Reform in both areas is long overdue. Several discrete subtopics are teed up for comment in the first phase of this proceeding, and XO agrees that each should be resolved quickly.

First, the intercarrier compensation cloud that has long hung over the head of Voice-over-Internet Protocol ("VoIP") traffic[1] must be removed. The Commission has steadfastly refused for more than a decade to determine either the jurisdictional classification of VoIP traffic or the appropriate intercarrier compensation system that should apply. The Commission's caution in this area has been understandable as VoIP truly is neither "fish nor fowl" – *i.e.* it is neither clearly an "enhanced" service as originally envisioned nor basic long distance telecommunications service. VoIP is an entirely new category of traffic that post-dates the enactment of the Telecommunications Act of 1996 ("1996 Act"). Since VoIP entails net protocol conversion, it seems to qualify an information service under current Commission rules, yet because it enables real-time two way voice transmission it closely resembles and displaces basic interexchange telecommunications service. As such, it does not make sense to either treat such traffic as essentially exempt from Title II regulation *or* to saddle it with the legacy subsidy flows that are inherent in the existing access charge structure.

XO suggests that there is a fair and reasonable middle ground. Since service providers could reasonably have interpreted existing access charges rules as permitting interconnected VoIP traffic to be terminated an either access charge-exempt "information service" or access charge-assessable "interexchange service," with respect to the past the Commission should clarify that, absent an agreement between the parties, the traffic was assessable in accordance

1 As discussed more fully below, these comments, when referring to "VoIP", include IP-enabled originating and terminating services that are connected to the Public Switched Telephone Network ("PSTN") generally, but do not include so-called "IP in the middle", which was addressed in the Commission's *AT&T IP-in-the-Middle Order*. . *See, Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges,* 19 FCC Rcd 7457 (2004).

with how the traffic was presented for termination. If a provider of VoIP services routed the traffic over local trunk groups for termination, then terminating LECs should properly have charged the reciprocal compensation rate. By contrast, if a carrier routed its VoIP traffic over interexchange trunks for termination, then terminating LECs could properly have charged the switched access charge rate. However, the Commission should make clear that prospectively VoIP will be treated as a separate category of "telecommunications" traffic that is not subject to switched access charges. In order not to impede the deployment of VoIP services by burdening them with termination charges priced well above cost, the prospective rule should provide that the cost-based reciprocal compensation rates be applied going forward when carriers exchange VoIP traffic on a TDM-basis.[2]

Second, XO supports the common-sense solutions that the Commission has proposed to resolve the so-called "phantom traffic" problem. Loopholes in the Commission's existing call signaling rules must be closed to permit accurate billing of interexchange services. All carriers should be required to generate and pass Calling Party Number ("CPN") and/or other jurisdictional-related signaling information without alteration. The measures proposed by the Commission in the NPRM are reasonably targeted to resolving the phantom traffic problem, and should be effective in substantially reducing, if not eliminating, phantom traffic without unduly burdening the service providers involved. There is absolutely no reason to revise the rules relating to call routing, Local Number Portability ("LNP") queries and the sections 251-252

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[2] Due to the nascent state of IP interconnection, and the fact that intercarrier compensation that applies to these arrangements have been privately negotiated thus far, XO does not believe that the Commission needs to address the rate for traffic exchanged under such arrangements until it considers IP interconnection policies as a whole, in order to avoid piecemeal development of those policies. XO will address IP interconnection policy in the next round of comments in this proceeding, and strongly urges the Commission to address IP interconnection issues herein. Most importantly, XO does not believe that the Commission should impose the current TDM-based intercarrier compensation rate structure on IP-to-IP interconnection arrangements.

negotiation process, as some have proposed. However, XO suggests that the Commission's proposal could be strengthened by permitting terminating LECs to charge the highest available intercarrier compensation rate when more than 10 percent of the traffic delivered to it lacks the required call signaling information.

Third, XO also supports the Commission's proposal for curbing "access stimulation" practices. The proposed rule changes properly focus on Local Exchange Carriers ("LECs") that take advantage of the rate-of-return access charge system by charging relatively high access charge rates established based on low historical demand even after targeting customers that generate extremely large volumes of access traffic. Requiring such LECs to mirror the access charge rates charged by those of the competing Bell Operating Company ("BOC") or largest ILEC in the state is a simple, reasonable and effective fix to the problem. However, the Commission should clarify that its rule changes would apply only to incumbent LECs ("ILECs") that tariff access rates that are higher than the access charge rates charged by the BOC (or other largest ILEC in the state), and competitive LECs ("CLECs") that benchmark their access rates to those charged by such ILECs.

Fourth, the Commission should take this opportunity to clarify its intercarrier compensation rules as required to prevent certain Commercial Mobile Radio Service ("CMRS") providers from "free riding" on the networks of competing wireline LECs. Specifically, the FCC should modify its rules to require CMRS providers to negotiate with CLECs for interconnection, and establish an interim default rate that will apply to CLEC-CMRS compensation arrangements.

I. THE COMMISSION MUST PROMPTLY REMOVE A DESTRUCTIVE CLOUD OF UNCERTAINTY BY ESTABLISHING AN INTERCARRIER COMPENSATION SYSTEM FOR VOIP TRAFFIC.

Beginning in the late 1990's, the Commission has indicated on numerous occasions that it intended to resolve the issue of what intercarrier compensation rate applies to the termination of

VoIP traffic. However, the Commission has yet to follow up and establish a compensation regime for VoIP traffic. As the Commission stated in the instant *NPRM*:

> Since 2001, the Commission has sought comment in various proceedings on the appropriate intercarrier compensation obligations associated with telecommunications traffic that originate or terminate on IP networks. Even so, the Commission has declined to explicitly address the intercarrier compensation obligations associated with VoIP traffic.[3]

Accordingly, industry participants continue to take a variety of approaches to the treatment of VoIP traffic.[4] The ensuing uncertainty has led to a wave of disputes and litigation between VoIP providers and LECs. It also has stifled innovation in the deployment of Internet Protocol ("IP") technology and created new arbitrage opportunities. Accordingly, it is past time for the Commission to resolve the issue, and specify an intercarrier compensation framework applicable to VoIP traffic.

A. The Commission Has a Long History of Providing Conflicting Signals and Deferring on the Adoption of a Compensation Framework for VoIP.

As early as 1998, the Commission acknowledged the need for rules specifically addressing compensation for VoIP traffic in light of developments in the communications marketplace. In its 1998 *Report to Congress*, the Commission anticipated addressing

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3 *In re: Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an United Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking*, FCC 11-13, ¶ 610 (Feb. 9, 2011).

4 *See also,Universal Service Contribution Methodology*, WC Docket No. 06-122, Report and Order and NPRM, 21 FCC Red 7518 (2006) ("VoIP USF Order"), *pet. for review granted in part and denied in part sub nom. Vonage Holdings Corp. v. FCC*, 489 F.3d 1232 (D.C. Cir. 2007).

compensation applicable to the exchange of IP-based communications traffic.[5] In particular the Commission noted:

> [We] may find it reasonable that they pay similar access charges. On the other hand, we likely will face difficult and contested issues relating to the assessment of access charges on these providers. For example, it may be difficult for the LECs to determine whether particular phone-to-phone IP telephony calls are interstate, and thus subject to the federal access charge scheme, or intrastate. We intend to examine these issues more closely based on the more complete records developed in future proceedings.[6]

While the Commission's desire for a comprehensive record is laudable, the *Stevens Report* became merely the first in a long line of missed opportunities.

In 2004, five years after the *Stevens Report*, the Commission initiated its *IP-Enabled Services* rulemaking proceeding to address the "appropriate legal and regulatory framework for categories of IP-enabled services."[7] However, rather than address the regulatory classification and compensation applicable to VoIP in that proceeding, the Commission issued its *Intercarrier Compensation NPRM* in 2005, wherein the Commission noted that "[t]he current intercarrier compensation system also does not take into account recent developments in service offerings, including bundled local and long distance services, and voice over Internet Protocol (VoIP) services" and sought comment on a variety of intercarrier compensation issues.[8] As with the *IP-Enabled Services* proceeding, the Commission declined to issue any rulings resolving VoIP compensation issues raised in the *Intercarrier Compensation* proceeding.

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5 *Universal Service (Report to Congress)*, 13 FCC Rcd 11501, ¶ 91 (1998) ("Stevens Report").

6 *Stevens Report*, ¶ 91.

7 *In re: IP-Enabled Services*, 19 FCC Rcd 4863, ¶ 6 (2004) ("IP-Enabled Services NPRM").

8 *In re: Developing a Unified Intercarrier Compensation Regime*, 20 FCC Rcd 4685, ¶ 148 (2005) ("Intercarrier Compensation NPRM").

At the same time that the Commission deferred action in the foregoing rulemaking proceedings, it also declined to rule on similar issues raised in carrier-specific petitions. For example, when resolving Time Warner's request for a declaratory ruling regarding obtaining interconnection for the provision of wholesale services to VoIP providers in 2007, the Commission refused to address prospective compensation for VoIP traffic.[9] The Commission similarly declined to decide the issue both in its initial order[10] and its reconsideration of Feature Group IP's conditional request for forbearance from the application of access charges to "voice embedded Internet communications."[11] It is past time for the Commission to adopt a compensation regime applicable to VoIP traffic.

B. The Commission's Refusal to Establish a Compensation Regime for Interconnected VoIP Traffic has been Harmful.

Many VoIP providers and others that transport VoIP traffic maintain that access charges do not apply because the traffic qualifies for the "enhanced service provider" exemption. By contrast, terminating LECs often insist that they are entitled to assess switched access charges because interexchange VoIP traffic constitutes a "telecommunications service". Continued uncertainty on this topic causes several substantial problems for the industry.

1. <u>Uncertainty Results in Increased Litigation.</u>

The lack of a definitive Commission rule on the compensation regime applicable to the termination of VoIP traffic has led to significant litigation before courts and state commissions as

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9 *In re: Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, 22 FCC Rcd 3513, ¶17 (2007) ("Time Warner Order").

10 *In re: Feature Group IP Petition for Forbearance From Section 251(g) of the Communications Act and Sections 51.701(b)(1) and 69.5(b) of the Commission's Rules,* 24 FCC Rcd 1571, n.19 (2009) ("Feature Group IP Order").

11 *In re: Feature Group IP Petition for Forbearance From Section 251(g) of the Communications Act and Sections 51.701(b)(1) and 69.5(b) of the Commission's Rules,* 25 FCC Rcd 8867, n.39 (2010) ("Feature Group IP Reconsideration Order").

carriers seek to resolve disputes regarding what compensation is owed for the termination of VoIP traffic. Recent conflicting decisions by several U.S. District Courts and a state regulatory commission demonstrate the confusion that has resulted.

In the recent *PAETEC Communications, Inc. v. CommPartners, LLC,* dispute regarding the applicability of access charges to VoIP traffic, CommPartners' filed a motion for primary jurisdiction stay to await a Commission response regarding the appropriate compensation regime.[12] In denying the motion, the U.S. District Court for the District of Columbia ("D.C. Circuit") noted that:

> The issue here is one that the parties agree the FCC has not addressed even though it has been considering it at least 2001[sic]. . . . Although some risk of inconsistent rulings is present, that risk is outweighed by the need for a decision: continued uncertainty about whether and when the FCC will ultimately address and decide the issue is unacceptable.[13]

The *PAETEC* Court ultimately found that because VoIP traffic resulted in net protocol conversion, the service was an information service exempt from access charges.[14]

This decision stands in stark contrast, however, to a decision of the Pennsylvania Public Utilities Commission ("PAPUC") issued just over a month later. The PAPUC found that Global NAPs was liable for payment of access charges on traffic which included VoIP traffic.[15] Moreover, the PAPUC Chairman pointed to the Commission's failure to address the issue as a main cause of uncertainty and litigation surrounding VoIP compensation issues:

> Because of certain actions or inaction of the Federal Communications Commission and certain decisions of federal

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12 *PAETEC Communications, Inc. v. CommPartners, LLC*, Memorandum Order, at 7, Civ. Action No. 08-0397 (JR), (D. D.C. Feb. 9, 2009).

13 *Id.* at 8.

14 *PAETEC Communications, Inc. v. CommPartners, LLC*, 2010 WL 1767193, *3 (D. D.C. Feb. 18, 2010).

15 *Palmerton Tel. Co. v. Global NAPs South, Inc., et al*. Docket No. C-2009-2093336, Opinion and Order (PA PUC Mar. 16, 2010) ("PAPUC Order").

> appellate courts that relate to VoIP and internet Protocol (IP) enabled services, there exists a certain degree to confusion in this proceeding regarding whether this Commission possesses and can exercise the appropriate subject matter jurisdiction to resolve this intercarrier compensation dispute.[16]

Just a few weeks after the PAPUC decision, a U.S. district court in New York found Global NAPs liable for payment of access charges related to the termination of VoIP traffic while expressing consternation over the Commission's failure to resolve the issue:

> The FCC, although failing to resolve the relevant issues that fall within its authority, has made statements that complicate the issues before the Court….[T]he FCC has clarified that so-called information services, unlike telecommunications services are not subject to access charges. The FCC has thus far "not classified interconnected VoIP service as a telecommunications service or information service as those terms are defined in the Act." Against this backdrop are a host of conflicting court and state regulatory rulings that have held, inter alia, that access charges are not applicable to VoIP calls and that access charges may be assessed for the termination of VoIP calls.[17]

The lack of VoIP-specific compensation rules will only result in additional uncertainty as carriers continue to bring their conflicts to courts and state commissions and these adjudicators reach sometimes contradictory decisions. Currently, intercarrier compensation disputes relating to VoIP have been brought in several district courts including cases in Delaware,[18] Massachusetts,[19] Missouri,[20] New York,[21] Pennsylvania,[22] and Virginia.[23] Similarly, carriers are

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16 *Palmerton Tel. Co. v. Global NAPs South, Inc., et al*. Docket No. C-2009-2093336, Motion of Chairman James H. Cawley at 1, 8 (PAPUC Feb. 11, 2010) ("Cawley Motion").

17 *Manhattan Telecoms. Corp v. Global Naps Inc.,* 2010 WL 1326095 (S.D.N.Y. Mar. 31, 2010).

18 *One Communications Corp. v. MCI Communications Svcs., Inc. d/b/a Verizon Business*, No. 09-cv-89 (D. Del. filed Feb. 9, 2009).

19 *Teleport Communications Wash., D.C., Inc. v. Global NAPs, Inc.*, No. 1:09-cv-11062-EFH (D. Mass. filed June 19, 2009).

also continuing to seek resolution of these issues by state commissions.[24] It is clear that litigation over compensation for VoIP traffic will continue for the foreseeable future unless the Commission takes action to definitively establish the applicable compensation regime.

2. Industry Uncertainty Creates Arbitrage Opportunities.

The lack of specific compensation rules for VoIP traffic increases the incentive for VoIP providers to engage in arbitrage in an effort to reduce or avoid payment of access charges. Currently, VoIP providers are permitted to connect to the PSTN via local trunks (thereby incurring reciprocal compensation charges[25]) , but they are not precluded from routing their VoIP calls as interexchange traffic over switched access trunks, thereby incurring switched access charges. Because reciprocal compensation rates typically are less than switched access rates, VoIP providers have an incentive to terminate their traffic over local trunks. Furthermore, because of the nomadic nature of VoIP services, providers often permit customers to select an

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[20] *Global Crossing Local Services, Inc. v. The Missouri Public Service Commission, et al.*, Case No. 4:11-cv-00315-RWS (E.D. Mo. filed Feb. 18, 2011) (seeking review of a Missouri PSC arbitration decision ruling that VoIP is subject to intrastate access charges);

[21] *Choice One of NY, Inc. v. Verizon NY Inc.*, No. 10-cv-1108 (S.D.N.Y. filed Feb. 10, 2010).

[22] *Choice One of Pa., Inc. v. Verizon Pa. Inc.*, No. 10-cv-670 (E.D. PA. filed Feb. 10, 2010).

[23] *Central Telephone Co. of Virginia, et al. v. Sprint Communications Co. of Virginia, Inc. et al.*, Case No. 3:09-cv-720 (E.D. Va. Filed Nov. 16, 2009).

[24] *See, e.g.*, *Bright House Networks Information Services (Florida), LLC. v. Verizon Florida, LLC and MCI Communications Services, Inc. d/b/a Verizon Business Services*, Docket No. 110056-TP (FL PSC filed Feb. 22, 2011) (BrightHouse seeks payment of access charges for termination of VoIP traffic); *Sprint Communications Co. L.P. v. Iowa Telecommunications Services, Inc., d/b/a Iowa Telecom*, Docket No. FCU-2010-0001, Order (IUB Feb. 4, 2011) (finding Sprint liable for payment of access charges for termination of VoIP traffic); *Petition of UTEX Communications Corp. for Post-Interconnection Dispute Resolution with AT&T Texas and AT&T-Texas Petition for Post-Interconnection Dispute Resolution with UTEX Communications Corp.*, Docket No. 33323, Order on Reconsideration of Arbitration Award (TX PUC Feb. 12, 2010) (affirming an arbitration award requiring UTEX to pay intrastate access charges for certain VoIP traffic).

[25] Some providers maintain no compensation at all is due for such traffic.

area code different from the area code where the customer resides.[26] A terminating carrier is unable to determine if traffic from a VoIP provider is local, intrastate toll or interstate toll, simply based on the originating and terminating telephone numbers.

The Commission could alleviate these arbitrage opportunities by establishing a specific rate applicable to the termination of VoIP traffic. The establishment of a specific intercarrier compensation rate would provide certainty to all industry participants regarding the compensation owed and would eliminate the incentive for VoIP providers to select one termination method over another in an attempt to avoid or reduce the termination rates paid for the traffic.

3. Industry Uncertainty Stifles Innovation.

As the Commission stated in its National Broadband Plan "there are allegations that regulatory uncertainty about whether or what intercarrier compensation payments are required for VoIP traffic, as well as a lack of uniform rates, may be hindering investment and the introduction of new IP-based services and products."[27] Carriers commenting in the National Broadband proceeding have echoed these concerns. Global Crossing noted in its comments that "[t]he lack of a simplified intercarrier compensation rate structure deters investment because it engenders protracted disputes and litigation concerning compensation for traffic across networks."[28] Similarly, in comments filed by Verizon and Verizon Wireless, the companies explained:

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26 *See, e.g.*, Federal Communications Commission: Voice Over Internet Protocol, Frequently Asked Questions at http://www.fcc.gov/voip.

27 Connecting America: The National Broadband Plan, Sec. 8.3 Universal Service, at 142 available at http://download.broadband.gov/plan/national-broadband-plan-chapter-8-availability.pdf

28 Comments of Global Crossing North America, Inc. NBP Public Notice #19, at 3-4, GN Docket Nos. 09-47, 09-51, 09-137 (filed Dec. 7, 2009).

> Today, next-generation, IP-based platforms are offering new and innovative services that challenge the traditional concepts of geography and location that are the cornerstones of the existing intercarrier compensation regime. . . . Ongoing uncertainty regarding the compensation due to – and from – providers of IP traffic serves a disincentive to further investment in the very next-generation services that consumers seek most.[29]

Plainly, the lack of a clear understanding of VoIP termination costs is a significant deterrence to the development on introduction of new IP-based services.

II. THE COMMISSION NEED NOT RESOLVE WHETHER VOIP IS AN INFORMATION OR TELECOMMUNICATIONS SERVICE BEFORE ESTABLISHING A COMPREHENSIVE COMPENSATION SYSTEM FOR THE EXCHANGE OF VOIP TRAFFIC.

VoIP services constitute "telecommunications," as that term is used in the Communications Act (the "Act"). As such, the Act contains the framework and bestows the jurisdictional authority on the Commission to adopt a compensation regime for the exchange of VoIP traffic. While some may argue that, to adopt an appropriate prospective compensation regime, the Commission must find that VoIP constitutes a "telecommunications service," as defined in the Act, this simply is not the case. The Commission need not and should not go further in classifying VoIP in this proceeding than is necessary to adopt an appropriate compensation framework.

A. VoIP Is Telecommunications.

Section 3 of the Act defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[30] Applying this definition, the Commission previously determined that providers of "interconnected VoIP" provide

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[29] Verizon and Verizon Wireless Comments – NBP Notice #19, at 17-18, GN Dot. Nos. 09-47, 09-51 & 09-137 (filed Dec. 7, 2009).

[30] 47 U.S.C. 153(43).

"telecommunications."[31] As the Commission notes in the instant *NPRM*, "[i]nterconnected VoIP services, among other things, allow customers to make real-time voice calls to, and receive calls from, the public switched telephone network (PSTN), and increasingly appear to be viewed by consumers as substitutes for traditional voice telephone services."[32] The Commission has recognized "that the definition of interconnected VoIP services may need to expand as new VoIP services increasingly substitute for traditional phone service."[33]

While XO does not believe that the Commission needs to expand the definition of "interconnected VoIP" for other purposes, the Company submits that any IP-enabled service that connects to the PSTN, including but not limited to *interconnected* VoIP, constitutes telecommunications and should be included within any compensation framework that the Commission adopts for VoIP traffic. Therefore, even if a service only allows customers to originate real-time voice calls or to receive voice calls from the PSTN, *but not both*, it should still fall within the new compensation framework XO advocates in these comments.[34] Similarly IP-enabled services that do not involve two-way voice communications, such as electronic fax-to-email services and IP-based voicemail services should also fall within the framework the Commission adopts in this proceeding because such traffic is indistinguishable from two-way voice calling.

Like several other Commission decisions regarding VoIP discussed in the previous section, the *VoIP USF Order* did not reach the issue of whether VoIP should be treated as telecommunications services or information services. As explained further below, the treatment

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31 *VoIP USF Order, supra*.

32 *NPRM* ¶ 612.

33 *VoIP USF Order*, Para. 36.

34 To be "interconnected VoIP, a service must do both.

of VoIP as telecommunications is adequate for the Commission to resolve the question, in this rulemaking proceeding, how intercarrier compensation for VoIP traffic should be treated going forward. XO does not herein comment on whether VoIP should be categorized as a telecommunications service or information service going forward. XO reserves its rights to address this matter, if necessary or as appropriate, in the future in this or other proceedings.

B. The Commission Should Exercise Its Authority to Regulate Compensation for the Exchange of VoIP Traffic Exclusively and Preempt State Regulation.

Under the Act, the Commission unequivocally has jurisdiction over all interstate traffic.[35] More importantly in the case of VoIP services, where the traffic is jurisdictionally mixed, but practically inseverable, the Commission has the authority to assert sole jurisdiction over such services, to the exclusion of the states. Indeed, the Commission has already taken this step in the case of interconnected VoIP services, and the reasons for doing so apply generally to all VoIP traffic.

When evaluating Vonage's Digital Voice service in 2004, the Commission found that interconnected VoIP was nomadic, such that the true origin or termination of a VoIP call using Vonage's service could not be ascertained readily.[36] The Commission, as a result, preempted state regulation of the Vonage VoIP service by Minnesota, and specifically noted that the characteristics of Vonage's service that led it to do so were "inherent features of most, if not all, IP-based services."[37] The Commission noted that, although its decision was limited to Vonage's Digital Voice service, it would preclude regulation to the same extent when faced with efforts by

[35] 47 U.S.C. §§ 151 and 152(a).

[36] *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22404 (2204) ("Vonage Order"), *pet'ns for review denied Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007)("Vonage Appeal").

[37] *Vonage order* [¶25 n. 93].

state commissions seeking to assert jurisdiction over "other types of IP-enabled services having basic characteristics similar" to Vonage's service.[38] On appeal, the Eighth Circuit affirmed, concluding that where "it is not possible to separate the interstate and intrastate aspects of the service," the Commission may preempt state regulation when "federal regulation is necessary to further a valid federal regulatory objective*, i.e.,* state regulation would conflict with federal regulatory policies."[39]

The nature of VoIP traffic continues to justify its sole regulation by the Commission as an interstate service, regardless of provider or technology. As an initial matter, as in 2004, when the *Vonage* Order was decided, it remains the case that providers of VoIP services have "no means of directly or indirectly identifying the geographic location" of customers, both when they place and receive calls.[40] The Eighth Circuit, in reviewing the *Vonage Order*, was persuaded regarding "the practical difficulties of determining the geographic location of nomadic VoIP phone calls."[41] VoIP services remain fully portable, relying only on the availability of a broadband connection.[42] In this regard, there is no ready difference between so-called "over the top" VoIP providers and facilities-based VoIP providers. Both types of services inherently enable their subscribers to be mobile or, more properly, "nomadic." Further, although telephone numbers may be assigned to the customers of VoIP services to facilitate connection to users of the PSTN, there is no nexus between the telephone numbers assigned and the actual geographic

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38 *Id.*

39 *Vonage Appeal* at 578. Although the Commission preempted state regulation of VoIP services in the *Vonage* order, it left room for the states to continue to play a vital role in protecting VoIP end users from fraud, enforcing fair business practices, and responding to consumer inquiries and complaints. *Vonage Order*, 19 FCC Rcd at 22404–05, ¶. 1

40 *Vonage Order* [¶23].

41 *Vonage Appeal* at 579.

42 *See Vonage Order* [¶5].

locations of these customers when they place or receive communications to or from the PSTN.[43] In short, the nomadic characteristics of VoIP traffic precludes practical placement of such traffic into separate interstate and intrastate buckets for jurisdictional purposes. Indeed, as VoIP services have evolved, any attempt to place operational requirements on such services so as to better facilitate jurisdictional classification would hinder the development and evolution of such services, as explained further below.[44] As such, virtually all VoIP services offer consumers any distance calling, making no distinction between so-called local and long distance calls, let alone intrastate and interstate.[45] Accordingly, the Commission's traditional end-to-end analysis is unsuited to specify any particular VoIP call as intrastate or interstate.

Even if it were possible, as a purely technological matter, to place a given call into the category of either interstate or intrastate based on an end-to-end analysis, the evolution of IP-based services is such that it both remains impractical and would frustrate federal policies to do so. In the *Vonage Order,* the Commission found that to require disaggregation of traffic into interstate and intrastate pools would require Vonage to substantially redesign its systems and service at significant cost solely to facilitate regulatory requirements. Significantly, there would be no benefit in the form of improved service to offset the increased cost or burden.[46] The Commission noted that it has declined to require similar steps taken to facilitate regulatory separation in the past in the absence of service-driven reasons. With today's IP network, it is

43 *See Vonage Appeal* at 579 (commenting on the difficulties of using assigned telephone numbers as indicators of geographic end points of a VoIP call).

44 *See Vonage Order* [¶ 25] (IP-PSTN services seek "to overcome geography, not track it.").

45 To the extent VoIP or other IP-enabled services combine other features and functionalities making it possible for end users to utilize multiple service features accessing different websites or IP addresses during the same "communications session," any effort to jurisdictionalize the traffic becomes all the less meaningful since the databases, websites, and services used during the communications session could be in a variety of locations both local and distant. *See Vonage Order* [¶¶ 23 and 25].

46 *Vonage Order* [¶ 29].

even more the case than it was seven years ago that requiring providers to integrate systems into their operations to permit segregation of VoIP traffic into interstate and intrastate categories would impose substantial costs based on an inadequate justification of allowing state regulation.

The Commission recognized seven years ago that imposing such regulatory burdens on VoIP providers would frustrate the development of IP-enabled services, which the Commission recognized promoted important policy objectives of consumer choice, the development of technology, the deployment of broadband infrastructure, and increased use of the Internet.[47] The Commission reiterated these same policy objectives in the *National Broadband Plan* and bemoaned the current intercarrier compensation network's creation of disincentives for providers to migrate to all-IP networks.[48]

Significantly, in reviewing the *Vonage Order*, the Eighth Circuit Court of Appeals sanctioned the Commission's taking into account the "economic burdens" that would be imposed upon VoIP providers if they were subject to requirements to deploy "a mechanism, such as the use of separate facilities within portions of the network, for distinguishing between interstate and intrastate communication merely to provide state commissions with an intrastate communication they can then regulate."[49] Indeed, earlier, in considering the Commission's *Computer Inquiry* rules, the Ninth Circuit Court of Appeals had upheld the Commission's preemption of state regulation of information services based in significant part on the determination of economic infeasibility "for the BOCs to offer the intrastate portion of such services on an integrated basis while maintaining separate facilities and personnel for the intrastate portion" of their services.[50]

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47 *See Vonage Order* [¶ 37].

48 *National Broadband Plan*, at 142.

49 *Vonage Appeal* at 578.

50 *California v. FCC*, 39 F.3d 919, 932 (9th Cir. 1994).

The Eighth Circuit blessed the Commission's preemption of Vonage's service on the grounds that BOCs otherwise would have been forced to choose between complying with an inefficiently disparate set of state and federal requirements and not offering the services at all. The Court also found that, to justify preemption, actual impossibility of separating out the interstate and intrastate portions of a service is not necessary if the result of doing so, per the Commission's examination, would impose burdens on providers and, ultimately consumers, frustrating the development of the services that FCC policies sought to encourage.[51] Here, in the case of VoIP and IP-enabled services, which further the Commission's broadband policies, the burden that would be placed by a separate set of state compensation requirements would frustrate the Commission's goals, justifying preemption.[52]

Several years have passed since the *Vonage Order* and *Vonage Appeal* without any such burden having been imposed simply to permit state regulation of VoIP services. IP-enabled services and the Internet, in the interim, have become all that much more important to our nation's economy and its citizens. Imposing such requirements now to permit regulation by the states distinct from the Commission would be even more deleterious than it would have been in 2004 because such services have continued to mature at a rapid rate. Rather, taking into account the nature of VoIP and other IP-PSTN services and the environment in which they operate, the case for preemption is clear. The Commission should not hesitate to assume sole regulatory

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51 *Id.* at 932-933.

52 As the Third Circuit Court of Appeals found in upholding the FCC's *Wireline Broadband Order*, the Commission's conclusion that continued application of its *Computer Inquiry* rules would inhibit "the development and deployment of innovative wireline broadband Internet access technologies and services" Justified preemption. *Time Warner Telecom v. FCC*, 507 F. 3d 205, 222 (3rd Cir. 2007). IP-PSTN services that ride on deregulated broadband connections should not themselves be subject to burdensome regulation or outdated compensation frameworks, a result which should apply to all IP-PSTN services regardless of technology or service provider.

authority and responsibility in setting a compensation framework that will apply to the exchange of such traffic nationally.

C. Compensation for the Exchange of VoIP Traffic Should Be Established in Accordance with Sections 251(b)(5), 251(i) and 201 of the Act.

As explained above,VoIP qualifies as "telecommunications." Further, the Commission should preempt state regulation of these services generally and treat them as *interstate*. VoIP traffic transported and terminated by local exchange carriers squarely falls within the scope of Section 251(b)(5) of the Act, and so the Commission should adopt rules to regulate the compensation for the "transport and termination" of such traffic pursuant to Section 251(b)(5). In order to prevent state commissions from undermining the Commission's exercise of its preemptive authority, and consistent with the Supreme Court's findings regarding the Commission's regulatory role under Sections 251(b) and 251(c) of the Act, the Commission should adopt tight rules regarding compensation for the transport and termination of VoIP traffic. To the extent that compensation for the exchange of certain VoIP traffic may not fall within Section 251(b)(5),[53] the Commission can and should exercise its general rulemaking authority over interstate communications under Section 201, fully preserved by Section 251(i) of the Act, to adopt regulations governing intercarrier compensation for such traffic. The Commission should not extend the broken access charge regime to VoIP traffic, but instead should implement a compensation framework consistent with that outlined by XO in the latter sections of these comments

[53] Section 251(b)(5) may not apply to VoIP traffic exchanged between carriers that are not LECs.

1. Section 251(b)(5) Generally Includes All Telecommunications within its Scope.

Section 251(b)(5) obligates LECs to enter into reciprocal compensation arrangements with other carriers "for the transport and termination of telecommunications."[54] Initially, in the *First Report and Order* in Docket No. 96-98, the Commission interpreted this provision to apply to "local" telecommunications traffic and adopted initial reciprocal compensation rules limited to the exchange of local traffic between LECs. Subsequently, the Commission revised its rules implementing Section 251(b)(5) to apply to *all* telecommunication traffic, both local and long-distance.[55] As the Commission noted in 2008, "[b]ecause Congress used the term 'telecommunications,' the broadest of the statute's defined terms, we conclude that section 251(b)(5) is not limited only to the transport and termination of certain types of telecommunications traffic, such as local traffic."[56]

The only statutory exceptions to the general rule are where access charges already apply.[57] Section 251(g) of the Act, incorporated as a result of the Telecommunication Act of 1996 (the "1996 Act"), provides the basis for the foregoing exception. In relevant part, the section provides:

> On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in *accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of*

[54] 47 U.S.C. 251(b)(5).

[55] *See* 47 C.F.R. §§ 51.701(a) (reciprocal compensation between LECs and other telecommunications carriers) and 51.703(a) (obligating LECs to enter into reciprocal compensation arrangements with requesting telecommunications carriers).

[56] *See Developing a Unified Intercarrier Compensation Regime,* CC Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 6475, ¶ 8 (Nov. 5, 2008) ("ISP-Bound Traffic Order").

[57] *See* 47 C.F.R. § 51.701 (b)(1)

> *compensation) that apply to such carrier on the date immediately preceding February 8, 1996,* under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. . . .[58]

Under Section 251(g), access charges apply only to that telecommunications traffic which was subject to such charges at the time the 1996 Act was passed. Otherwise, telecommunications traffic is subject to no more than reciprocal compensation arrangements under Section 251(b)(5), or such other compensation regime as the Commission may adopt.. VoIP traffic was not exchanged between providers at the time the 1996 Act was passed into law. Accordingly, VoIP traffic is not subject to the access charge regime that pre-dated the 1996 Act but is subject to, at most, reciprocal compensation under Section 251(b)(5) of the Act.[59]

Although the flow of VoIP traffic exchanged between carriers ordinarily is reasonably balanced, occasionally the predominant traffic flow is in the direction of the terminating LEC. In these cases, the effective one-way nature of the traffic does not impact the propriety of using Section 251(b)(5) rules to establish the compensation rates. The Commission's Rules already acknowledge other one-way arrangements as falling under the reciprocal compensation framework, such as the termination of paging traffic.[60] Further, while LEC-to-LEC exchange is a two-way relationship, under the reciprocal compensation rules, "[a] LEC may not assess charges on any other telecommunications carrier [apart from another LEC]

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58 47 U.S.C. § 251(g)(emphasis added).

59 Even if the Commission were to somehow conclude that IP-PSTN traffic was subject to the access charge rules as a result of regulatory frameworks in place at the time the 1996 Act was passed, Section 251(g) permits the Commission to enact "explicitly supersed[ing]" rules. Here, for the policy reasons amplified herein – promoting the development of broadband and the transition to all-IP networks among them – the Commission should, if necessary, explicitly adopt such superseding rules.

60 *See* 47 C.F.R. § 51.711(c).

for telecommunications traffic that originates on the LEC's network."[61] Such requirements are consistent with past Commission determinations that Section 251(b)(5) is not limited to LEC-LEC traffic exchanges.[62]

2. <u>The Commission Should Adopt Rules That Constrain the Role of State Commission's in Setting Compensation Arrangements for VoIP Traffic Exchange.</u>

Section 251(b)(5) of the Act has a rough, but not coterminous, counterpart in Section 252(d)(2), which sets forth the standards to apply to reciprocal compensation rates that an *incumbent* LEC may assess for transport and termination. Section 252(d)(2) is designed, in general, to guide state Commissions that are asked to arbitrate reciprocal compensation rates when negotiations under between a requesting carrier and an incumbent LEC under Section 251(c) break down. Section 252(d)(2) provides for the recovery of network costs associated with the transport and termination of calls, based "on a reasonable approximation of the additional costs of terminating such calls."[63] Although on its face, Section 252(d)(2) applies to ILEC cost recovery for transport and termination, the Commission has used Section 252(d)(2) as its guide for establishing regulations under which other carriers may enter into Section 251(b)(5) reciprocal compensation arrangements.[64]

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61 47 C.F.R. § 51.703(b).

62 The Commission rejected the argument that Section 251(b)(5) was limited to LEC-to-LEC exchanges in the *Local Competition First Report and Order*, finding that Section 251(b)(5) applies to traffic exchanged by a LEC and any other telecommunications carrier. *Local Competition First Report and Order*, 11 FCC Rcd 14999, at 16013-16, paras. 1034-41 (1996) (subsequent history omitted). *See also ISP Remand Order*, para. 89 n.177 ("Section 251(b)(5) applies to telecommunications traffic between a LEC and a telecommunications carrier . . . .").

63 47 U.S.C. § 252(d)(2)(A)(ii).

64 *See* 47 C.F.R. § 51.711 (establishing pricing standards for non-ILECs under the Commission's reciprocal compensation framework).

More significantly, past Commission action makes clear that it may adopt special rules for specific types of traffic under the reciprocal compensation framework of 251(b)(5). In 2008, the Commission confirmed that Section 251(b)(5) was broad enough to encompass ISP-bound traffic.[65] As long as the dictates of Section 251(b)(5) are otherwise adhered to, the rationale of the ISP-bound traffic cases make clear that the Commission has the authority to adopt special rules under Section 251(b)(5) that apply to certain types of traffic, including VoIP traffic.

3. <u>Section 201(b) of the Act Fills in Any Gap in the Commission's Rulemaking Authority to Adopt Rules Governing Compensation for VoIP Traffic.</u>

For the reasons stated above, Section 251(b)(5) and the pricing standard of Section 252(d)(2) provide a sufficient basis for the agency to adopt special rules to implement a reciprocal compensation regime governing VoIP traffic. However, to the extent there are any perceived gaps in the scope of Section 252(d)(2) to adopt the rules supported in these comments, the Commission has already analyzed the relationship between Section 251(b)(5) and Section 252(d)(2) and concluded that the latter does not constrict the scope of the former.

In 2008, when considering its compensation rules for ISP-bound traffic, the Commission observed that:

> Section 252(d)(2)(A)(i) does not address what happens when carriers exchange traffic that originates or terminates on a third carrier's network. This does not mean, as Verizon suggests, that section 251(b)(5) must be read as limited to traffic involving only two carriers. Rather, it means that there is a gap in the pricing rules in section 252(d)(2), and the Commission has authority under section 201(b) to adopt rules to fill that gap.[66]

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65 *See ISP-Bound Traffic Order*, ¶ 7 (Nov. 5, 2008).

66 *ISP-Bound Traffic Order*, ¶ 12.

Accordingly, even if it is the case that Section 252(d)(2), as a rate standard, is limited to situations involving the exchange of VoIP traffic between two LECs, the Commission may use its general rulemaking authority under Section 201(b) to adopt compensation regulations governing the full scope of arrangements that fall under Section 251(b)(5), including when an intermediate carrier delivers VoIP traffic that originated on a third party's network to a LEC for termination. There can be no question that interstate telecommunications, such as VoIP traffic, falls within the authority of the Commission under Section 201(b) to "prescribe rules and regulations as may be necessary in the public interest to carry out the provisions of [the] Act."[67] As if to underscore the point, in the 1996 Act, Congress made plain that nothing in Section 251, including sub-section 251(b)(5), "shall be construed to limit or otherwise affect the Commission's authority under section 201."[68] In other words, VoIP traffic remains within the scope of the FCC's jurisdiction under Section 201(b) – because it is properly treated as jurisdictionally interstate under the preemption analysis provided above – even if it also falls under Section 251(b)(5), which in this case, it does. In conclusion, whether under Section 252(d)(2) or Section 201(b), the Commission has the authority to adopt rules to implement the requirements under Section 251(b)(5), which is broad enough to encompass all VoIP arrangements between LECs and other carriers.

D. Any Commission-Mandated Intercarrier Compensation Scheme for IP-PSTN Traffic Must Apply Only *Prospectively.*

Although the Commission should adopt specific reciprocal compensation rules for VoIP traffic, it should do so only prospectively. Given the history of the Commission's consideration of the regulatory treatment of VoIP services, retroactive application of any particular

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67 47 U.S.C. § 201(b).

68 47 U.S.C. § 251(i).

compensation treatment for such traffic would not have been reasonably foreseeable. Retroactive application of rules adopted in this proceeding would represent a manifest injustice, opening the floodgates to destructive litigation that would threaten to overwhelm the industry just as the Commission is trying to transition it to embrace more balanced intercarrier compensation relationships, and migration to all-IP networks.

As discussed above, the Commission has reached no definitive conclusion regarding the regulatory classification of VoIP services as telecommunications services or information services. In the absence of a definitive pronouncement by the Commission on the regulatory treatment and compensation framework for VoIP traffic, originating carriers have self-determined whether their VoIP traffic is telecommunications service or information service based on the type of facilities over which they have chosen to terminate the traffic.

In this context, which has continued to prevail over the past five years, the Commission's rules provide VoIP providers with the opportunity to connect to the PSTN over local trunks or switched access trunks. In XO's experience, many VoIP providers have chosen to terminate their traffic over switched access trunk groups. When such VoIP traffic is presented for termination over switched access trunk groups, LECs cannot distinguish the calling from any other interexchange traffic and, accordingly, routinely charge switched access rates for terminating the traffic. Absent other arrangements between providers, in such circumstances, it has been reasonable and proper for carriers to elect to bill access charges. Conversely, since VoIP traffic entails the net protocol conversion that has permitted service providers to elect to be treated as enhanced service providers, frequently in combination with other enhanced features and functionalities, many other VoIP providers have elected to route their VoIP traffic over local trunks for termination. Under such circumstances, the traffic has properly been treated as an information service subject to local exchange charges or the reciprocal compensation that applies to local traffic. In either event, the VoIP provider and the intermediate carrier(s) consider the traffic exempt from the payment of access charges.[69]

In previous debates on the question of appropriate compensation, it has often been assumed that the issue turns on the categorization of VoIP traffic as an information service or telecommunications service. As demonstrated herein, the task before the Commission does not turn on making these distinctions, but rather the mere finding that VoIP services are telecommunications gives the Commission the framework to adopt regulations under Section 251(b)(5) and Section 201 of the Act. Because the Commission has still not addressed whether providers of VoIP and other IP-enabled services are to be regulated as information service carriers or telecommunications service providers, XO contends that the Commission apply the compensation framework adopted herein prospectively only. To do otherwise in the current environment and to apply the regulatory framework retroactively would inherently be predicated on the conclusion that VoIP services are and always have been treated as telecommunications services, a determination the Commission has clearly declined to make despite numerous opportunities and need not make even here to adopt a comprehensive compensation framework to apply to the exchange of VoIP traffic.

Rulemaking decisions generally are given prospective effect only.[70] Moreover, even adjudicatory decisions in the regulatory context, which are generally given retroactive effect,[71]

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69 The Commission tentatively noted in its draft orders on reciprocal compensation in late 2008 characteristics of many IP-PSTN services which, in addition to net protocol conversion, which would give them a separate basis to contend they should be deemed information services (although still telecommunications): "IP/PSTN services are not mere changes to the underlying technology used for 'existing' basic services, but are entirely new services with characteristics in many ways distinct from pre-existing telephone services." *ISP-Bound Traffic Order*, Appendix A, ¶ 210; Appendix C ¶ 205.

are limited to prospective effect where retroactive application would work a "manifest injustice." In the case of intercarrier compensation for VoIP traffic, apart from general practice, the Commission's rules should be given prospective effect only because to do otherwise would result in manifest injustice.

The D.C. Circuit, for example, has drawn a distinction between agency decisions that "substitut[e] . . . new law for old law that was reasonably clear," and those which are merely "new applications of existing law, clarifications, and additions."[72] In the former case, when an agency decision changes a view of the law that has come to be viewed as well-settled and long accepted, for which parties have reasonably relied to their detriment, retroactivity will be denied.[73] In the latter case, the presumption of retroactivity will be departed from only when to do otherwise would lead to a "manifest injustice."[74]

In this proceeding, the adoption of rules governing compensation for VoIP traffic would clearly be the substitution of new law for a reasonably clear set of circumstances under which carriers and providers have operated to date. In that context, the rule changes advocated in these comments would, without a doubt, replace the current regulatory framework with something new. Consequently retroactive application would be inappropriate.

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70 *See, e.g., In re: Federal-State Joint Board on Universal Service*, 23 FCC Rcd 6221, ¶ 14 (2008).

71 *See SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). (holding that "[e]very case of first impression has a retroactive effect, whether the new principle is announced by a court or by an administrative agency").

72 *Verizon Telephone Cos. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001) ("*Verizon*") (internal quotation marks omitted).

73 *See Williams Natural Gas Co. v. FERC*, 3 F.3d 1544, 1554 (D.C. Cir. 1993); *Clark Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1083-84 (D.C. Cir. 1987) (en banc).

74 *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir 2001); s*ee also Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987) (en banc) ("*Clark-Cowlitz*"); *Consolidated Freightways v. NLRB*, 892 F.2d 1052, 1058 (D.C. Cir. 1989).

A leading test, which has been used by the Commission, for determining whether retroactive application of a rule adopted in an adjudicatory proceeding is appropriate was established by the D.C. Circuit in *Retail, Wholesale & Dep't Stores Union v. NLRB*.[75] While the current docket is a rulemaking proceeding, application of these factors here underscores that the Commission should make plain that the treatment it adopts for compensation for the termination of VoIP traffic in this proceeding should be applied on a going forward basis only.

In the *Retail, Wholesale* case, the court enunciated a non-exhaustive list of five factors to consider in determining whether to grant an exception to the general rule permitting retroactive application of a rule announced in an agency adjudication. Those factors are:

> (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an existing unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.[76]

As the D.C. Circuit subsequently explained, these factors "boil down to . . . a question of concerns ground in notions of equity and fairness."[77]

When applied to the instant situation, the *Retail, Wholesale* factors weigh quite heavily against applying a new compensation framework for VoIP traffic retroactively. As noted earlier, the Commission has never previously addressed the issue that the contemplated rules would govern. Accordingly, under the first factor, this is clearly a case of first impression before the

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75 *Retail, Wholesale & Department Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972). The Commission recently applied this methodology in analyzing whether to retroactively apply its decision regarding the regulatory classification of certain prepaid calling cards. *Regulation of Prepaid Calling Card Services*, Declaratory Ruling and Report and Order, 12 FCC Rcd 7290, 7305 (¶¶ 42-43) (2006).

76 *Id.*

77 *Cassell v. FCC*, 154 F.3d 478, 486 (D.C. Cir. 1998) (citations omitted).

Commission, weighing in favor of prospective application only. Under the second factor, the Commission should find that the new rules depart from the existing framework that has been in place at least since the Commission's *Stevens Report*, almost 13 years ago – and which has its roots in the adoption of the enhanced service provider exemption almost three decades ago -- under which "some interconnected VoIP providers may hold themselves out as telecommunications carriers, but others do not, considering themselves instead to be 'end users.'"[78] Those providers that treated VoIP traffic as information services and therefore not subject to access charges, were well-founded under the enhanced services definition which made net protocol conversion a touchstone for qualification as enhanced services.

Under the third of the *Retail, Wholesale* factors, there can be little doubt that retroactive application of a VoIP traffic compensation regulatory framework adopted in this rulemaking would undermine the reliance that many providers of VoIP service, and the carriers that transported their traffic, reasonably placed on the Commission's enhanced services exemption to access charges, *i.e.*, intercarrier compensation, as applied to VoIP traffic. To have to pay per minute intercarrier compensation now for prior years would place a huge *ex post facto* economic burden on all providers of VoIP services, chilling further innovation and development for years to come. Significant segments of the industry, as the Commission has recognized,[79] built their business plans with the understanding that under the Commission's rules, VoIP services were enhanced and not subject to access charges or other intercarrier payments, while at the same time cognizant, and accepting, of the fact that the Commission might, *prospectively*, adopt such a compensation requirement. Thus, the fourth factor in the test – the degree of burden stemming from retroactive application -- counsels against retroactive application. Finally, under the fifth

[78] *VoIP USF Order*, ¶ 58.

[79] *Id.*

and final factor, there is no overriding statutory interest in applying a compensation obligation retroactively. To the contrary, the Act directs the Commission to promote the development of advanced services such as IP-based offerings.[80]

Even if the Commission's determination were construed to be a clarification of existing law to new situations, retroactivity must be denied if, as here, it would work a "manifest injustice."[81] As explained above, retroactive application would create a tremendous after the fact economic burden on VoIP providers and carriers that transported their traffic in good faith reliance on existing access charge exemptions. The manifest injustice of such a ruling would work which would be exacerbated given the lengthy period of time in which the Commission has failed to reach a conclusion that VoIP services are telecommunications services while providers have implemented their business plans and grown their offerings to bring broadband services to many customers. It would be simply inequitable to apply any particular compensation obligation retroactively. A prospective-only ruling is the only outcome that can be reconciled with past Commission practices and action and the relevant precedents.

Consequently, the Commission should state expressly that its adoption of the rules regarding compensation for VoIP traffic constitutes a "change of law," in order to avoid additional needless litigation over VoIP compensation during the lengthy period in which the Commission chose not to address specifically the regulatory treatment of VoIP traffic, and providers had to rely on a non-VoIP-specific regulatory framework. As the *National Broadband Plan* recognized, there has already been considerable litigation regarding proper compensation for VoIP traffic.[82] The formulation for compensation for VoIP traffic discussed herein that

80 Section 706 of the 1996 Act.

81 *Verizon Tel. Cos. v FCC*, 269 F.3d 1098, 1109 (D.C. Cir 2001).

82 *See National Broadband Plan* at 159 n. 53.

clearly applies only prospectively would promote the policies of moving all providers toward all-IP networks as expeditiously as possible and encourage deployment and adoption of competitive broadband offerings while also forestalling new rounds of disputes and litigation that would be destructive to achieving these objectives.

III. THE COMMISSION SHOULD SPECIFICALLY ADDRESS COMPENSATION FOR TERMINATING VOIP TRAFFIC EXCHANGED VIA TDM-INTERCONNECTION.

With respect to intercarrier compensation issues, this proceeding is bifurcated – with the first phase considering certain interim steps necessary to curb uneconomic arbitrage and a second phase that is focused on permanent solutions. XO intends to discuss its intercarrier compensation proposal that would apply to IP-to-IP interconnection arrangements generally, and any transitional arrangements necessary to implement it, during the second comment cycle. To the extent that carriers are interconnected on an IP-to-IP basis, there has been little opportunity for arbitrage since those agreements have been negotiated between carriers to suit their needs. Clearly, saddling VoIP delivered over IP-to-IP interconnection arrangements with the same legacy intercarrier compensation that might apply when legacy TDM-based interconnection is used would be a significant impediment to progress. Therefore, the Commission should not establish a compensation regime for VoIP traffic exchanged via IP-to-IP interconnection until it addresses IP interconnection policies as a whole.

A. When Parties Exchange Traffic via TDM-Based Interconnection, Reciprocal Compensation Rates Should Apply to the Termination of VoIP Traffic.

XO believes that, absent an agreement between the parties, the appropriate intercarrier compensation rate to apply for termination of VoIP traffic that is exchanged on a TDM basis is the reciprocal compensation rate. State commissions have established TELRIC-based reciprocal compensation rates for traffic not subject to access charges and terminated by LECs over TDM-based interconnection and circuit switching platforms. Under existing TELRIC rules, the reciprocal compensation rates ensure that the terminating carrier is able to recover its forward looking costs plus a reasonable return on its investment. At the same time, since TELRIC methodology does not permit inclusion of subsidy flows or inordinate recovery of overhead (or other joint and common costs), the originating carrier is not required to pay an uneconomic rate for the termination service. Thus, with respect to TDM traffic, the reciprocal compensation rate achieves a fair balance of the legitimate interests of both the originating and terminating providers.

It would not be appropriate to permit LECs to charge VoIP providers the full switched access rate on VoIP traffic. While the Commission has made great progress over the past 15 years in reducing the subsidy amounts embedded in access charge rates, there is no doubt that they still are not priced at economic cost. Permitting LECs to charge access charge rates would deter providers from migrating to the use of VoIP technology as quickly as possible. Even for service providers that are not yet interconnected on an IP-to-IP basis, VoIP technology offers end users efficiency and functionality that represent a substantial improvement over legacy PBX or Centrex-like technology. The Commission should not impede the migration toward VoIP deployment by saddling it with the legacy subsidy flows that remain inherent in the existing access charge pricing scheme.[83] On the other hand, the Commission also should ensure that terminating carriers may assess the reciprocal compensation rate to VoIP traffic even in the absence of an agreement so that VoIP providers cannot refuse to negotiate a reciprocal compensation agreement to avoid paying any rate for termination of their traffic.

[83] As discussed below, however, carriers should not be permitted to later dispute the assessment of access charges if traffic was not designated as VoIP.

However, the reciprocal compensation rate would apply only where service providers clearly designate the traffic upfront as VoIP traffic.[84] Carriers may designate traffic as VoIP either by agreement with the terminating carrier or by using an industry standard mechanism. The Commission should consider adopting an industry standard mechanism for providers to designate VoIP traffic in the absence of an agreement. For example, pursuant to agreements already in place, some carriers are currently exchanging VoIP traffic via local interconnection trunks and populating the Jurisdictional Indicator Parameter ("JIP") field on the call record to designate the traffic as VoIP traffic that is exempt from access charges. Alternatively, use of factors may be a more appropriate mechanism for designating VoIP traffic for carriers that are not immediately able to populate the JIP field. For instance, under current industry practice and pursuant to many LEC tariffs, interexchange carriers provide factors to terminating carriers to indicate a percentage of the total volume of terminating traffic that is local, interstate or intrastate. These factors are often used when the jurisdiction of the call cannot otherwise be determined. Similar factors could be provided to LECs by VoIP providers to indicate the percentage of traffic terminated over the switched access trunks that is IP-originated. Terminating LECs would then use those factors to adjust monthly access charge billing to VoIP providers (or third parties transiting VoIP traffic), essentially re-rating to reciprocal compensation rates that portion of traffic that has been designated as VoIP.

Upfront designation of the traffic as VoIP is critical to facilitating proper billing and to avoid endless after-the-fact billing disputes. If a VoIP provider does not adhere to these procedures, then terminating LECs should be permitted to regard and bill VoIP traffic as subject

[84] Creating a new set of trunking arrangements simply to route interconnected VoIP traffic would be unduly costly and disruptive. Proper tracking and billing can occur if VoIP traffic is discretely identified in the associated call records and routed over existing trunk groups.

to switched access charges if the call detail indicates that the traffic is interexchange. Furthermore, similar to the audit rights granted in carrier access tariffs, terminating carriers should have the right to audit and verify the originating carrier's designation of VoIP traffic. If such traffic was improperly designated, then it would be subject to access charges. Moreover, this compensation arrangement should be reciprocal, such that an originating carrier cannot charge terminating access charges for calls *to* its VoIP customers while also designating calls (or factoring calls) as VoIP *from* those some VoIP customers in order to avoid paying the access rate. The originating carrier must be required to treat its customers and services consistently for compensation purposes, whether the carrier is originating or terminating traffic.

B. The New VoIP Intercarrier Compensation System Should Take Effect Immediately.

There has been a dark intercarrier compensation cloud hanging over the head of the VoIP industry for more than a decade. Foot dragging on the adoption of a specific VoIP traffic compensation framework has led to innumerable disputes between VoIP providers and terminating LECs. It is time to end the uncertainty and industry infighting by moving immediately to a clear intercarrier compensation framework applicable to VoIP traffic. Immediate implementation of the compensation framework proposed by XO would not unfairly prejudice anyone. VoIP providers would benefit from the use either of bill-and-keep or a cost-based rate, while LECs would be guaranteed rates that enable them to recover their reasonable costs of service. While a significant transition period for phasing down access charge rate levels for basic interexchange traffic makes sense to avoid an undo revenue shock to LECs, a similar transition would be unwarranted with respect to VoIP traffic since much of it already is routed over local trunk groups for termination at reciprocal compensation rates.

C. The New VoIP Intercarrier Compensation System Should Apply To All VoIP Traffic that Originates from or Terminates to the PSTN.

A major objective of this proceeding is to end uneconomic arbitrage. XO applauds that objective. To make it a reality, however, it is critical that the same intercarrier compensation system be applied to *all* VoIP traffic. All VoIP traffic routed through the PSTN (except "IP-in-the-middle" traffic) should be subject to the same intercarrier compensation rules – regardless of whether the traffic is associated with a "fixed" or "nomadic" end user application, emanates from a wireline or wireless network, is associated with one-way or two-way communications, or touches the public network on the originating or terminating end of the transmission. In each case, the exact same use is made of the PSTN and the same costs are imposed on the terminating (or originating) LEC for its use of the PSTN network, and hence the compensation charged should be the same. Charges should vary only based upon whether the carriers involved are interconnected on an IP-to-IP versus TDM basis. To do otherwise would be to inevitably confer an arbitrary economic advantage on one form of VoIP over another by regulatory fiat, and invite a new round of uneconomic arbitrage.

IV. WITH MODEST ADJUSTMENTS, THE COMMISSION'S PROPOSAL TO ELIMINATE "PHANTOM TRAFFIC" SHOULD BE ADOPTED EXPEDITIOUSLY.

XO has long supported the notion of adopting reasonable rules to address the limited problems caused by traffic that is routed without including proper originating line signaling information or other call detail reasonably required to permit accurate billing.[85] Specifically, XO

[85] *See, e.g.*, Comments of Broadview, Nuvox, One and XO, CC Docket No. 01-92, at 13-19 (filed Dec. 7, 2006)(*"Missoula Plan Comments"*); Reply Comments of Broadview, Nuvox, One and XO, CC Docket No. 01-92, at 10-12 (filed Jan. 5, 2007); Letter of Thomas Cohen of Kelley Drye & Warren LLP on behalf of XO, filed in CC Docket No. 01-92 (dated March 11, 2008)(*"USTelecom Proposal Letter")*; Letter of Brad Mutschelknaus of Kelley Drye & Warren LLP on behalf of XO, filed in CC Docket No. 01-92, at 4 (dated Oct. 22, 2008)(*2008 Intercarrier Compensation Reform Letter"*);

has advocated that loopholes in the Commission's current call signaling rules be closed. XO first outlined the changes necessary in 2006 when commenting on aspects of the so-called "Missoula Plan."[86] XO recommended rule changes then that would require all carriers and other VoIP providers to populate and pass CPN and/or other jurisdictional-related signaling information without alteration. A year later, XO filed in support of a detailed "phantom traffic" eradication proposal submitted by USTelecom. Specifically, XO supported USTelecom's proposed rules dealing with the population and transmission of call signaling information.[87] XO reiterated its support for most of the USTelecom proposal[88] yet again when commenting on intercarrier compensation proposals in 2008, stating that "[t]here is an industry consensus that relatively simple modifications to rules governing call signaling and routing would render…access avoidance opportunities obsolete,"[89] and later endorsed the then-Chairman's proposal to alter FCC rules to effectively prohibit any altering or stripping of SS7 CPN, MF ANI and CN signaling information, and to obligate intermediate service providers to pass, unaltered, whatever signaling information they receive.[90] As XO stated then, "[b]y requiring that all calls be populated with call origin identifying information, and expanding such requirements to include intrastate calling and MF-based traffic, the draft proposal would deny unscrupulous service

Comments of Broadview, Cavalier, Nuvox and XO, CC Docket No. 01-92 *et seq*., at 6-9 (filed Nov. 26, 2008)(*"2008 Intercarrier Compensation Reform Comments"*).

86 Missoula Plan Comments.

87 USTelecom Proposal Letter.

88 XO's support of the USTelecom proposal relating to phantom traffic was strictly to aspects that dealt with the population and transmission of call signaling information. XO opposed – and continues to oppose – USTelecom's suggestions that rules relating to call routing, LNP queries and the sections 251 and 252 negotiation process also be altered to address phantom traffic concerns.

89 2008 Intercarrier Compensation Reform Letter at 4.

90 2008 Intercarrier Compensation Reform Comments at 7-8.

providers any opportunity to avoid access charge obligations by employing strategies which disguise the jurisdictional character of traffic delivered to LECs for termination."[91]

The rule changes proposed by the Commission in this phase of the proceeding similarly address the phantom traffic problem by filling the gaps in current rules applicable to call signaling, and XO continues to support the proposed modifications. The proposed measures are reasonably targeted to addressing the phantom traffic problem, and should be effective in substantially reducing, if not eliminating, phantom traffic without unduly burdening the service providers involved. However, the Commission should make clear that originating carriers are required to accurately populate call originating information in addition to requiring carriers to pass along that information to downstream carriers in the call path. If the information is not accurately populated at the outset, the passing along of misleading information will not serve the needs of the terminating carrier.

As the Commission is aware, the CPN field is used to populate caller ID in addition to indicating the originating location of the call. The Commission and Congress have recognized that "not all instances of caller identification manipulation are harmful, and some may be beneficial".[92] Moreover, the Commission's own rules allow telemarketers to modify the caller ID to reflect the telephone number of the seller on whose behalf the telemarketing call is made.[93] Increasingly, end users want the ability to modify their outgoing caller ID for valid reasons unrelated to fraud. In particular, as carriers' services are ever more nomadic, end users want the ability to direct callbacks to a particular location that may not be the calling party's location. To account for these modifications in use of the CPN field, LECs often populate, for example, the

91 *Id*. at 8.

92 Rules and Regulations Implementing the Caller ID Act of 2009, WC Docket No. 11-39, NPRM, para. 7 (rel. March 9, 2011).

93 *See* 47 C.F.R. 64.1601(e).

Charge Number ("CN") field to indicate the originating location, or proxy, of the call. The Commission should ensure that its rule modifications do not overly restrict carriers and customers who have legitimate reasons for modifying the CPN field to display an appropriate caller ID, so long as those carriers populate other fields (such as the CN field) to indicate the originating location (or proxy) to permit accurate rating of the call.

XO also believes that the Commission's proposal could be improved by providing some additional teeth to them. Specifically, the then-Chairman's Draft Proposal offered for comment in late 2008 included a reform which would enable terminating LECs to enforce the expanded call signaling requirements by permitting them to charge the highest available rate when terminating traffic that lacks any of the required accurate call signaling information.[94] Specifically, the Commission should permit terminating LECs to charge the highest available intercarrier compensation rate when 10 percent or more of traffic delivered lacks the proper signaling information. XO believes that this enhancement would increase the effectiveness of the proposed call signaling-related rule changes significantly by imposing clear and immediate consequences for infractions.

Finally, XO commends the Commission for not over-reaching by acceding to requests to use the phantom traffic issue as a pretext to modify call routing and interconnection agreement-related rules.[95] As XO has stressed previously, the phantom traffic problem can be fully resolved by filling holes in the rules relating to the population and transmission of call signaling-related information. Thus, USTelecom's request that the Commission also revise the rules

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[94] *See,* In the Matter of High Cost Universal Service Support, *et. al*., WC Docket No. 05-337, *et al.,* Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, FCC 08-262 (rel. Nov. 5, 2008), the "Chairman's Draft Proposal" at paras. 330-333.

[95] *See,* NPRM, para. 634.

related to call routing, LNP queries and the sections 251 and 252 negotiation process are misguided attempts to address unrelated concerns under the pretext of achieving phantom traffic-related reform. Indeed, USTelecom's proposed requirement permitting ILECs to request interconnection and arbitration pursuant to section 252 with other carriers with which the ILECs exchange traffic is not even legally permissible. All LECs should enter into good faith negotiations when they receive a request from another directly or indirectly connected telecommunications carrier to negotiate traffic exchange agreements. These agreements, when involving LECs, would be negotiated pursuant to the "all local exchange carrier" obligations of section 251(b)(5). If a competitive LEC makes the request of an ILEC, then sections 251(c)(2) and 252 would apply, but not *vice versa*. ILECs, by definition, are not requesting carriers pursuant to Section 251(c) and thus cannot initiate the negotiation/arbitration process pursuant to section 252.[96] The Commission can encourage non-ILECs to respond to ILEC requests for negotiation, but it lacks the legal authority to require that competitive carriers negotiate and arbitrate with ILECs at the ILEC's request under the auspices of sections 251(c) and 252.

V. THE COMMISSION'S NARROWLY-TAILORED PROPOSAL APPROPRIATELY TARGETS EXCESSIVE RATES OF CARRIERS THAT TAKE ADVANTAGE OF THE RATE-OF-RETURN ACCESS SYSTEM.

A. The Rate-Of-Return Access System Creates Incentives For Access B. Stimulation Arbitrage.

The Commission's current rules grant rate-of-return ILECs, and CLECs who benchmark to those ILECs, tremendous flexibility to establish excessive access rates and impose those rates on other carriers with near impunity. As the Commission noted in the NPRM, most rate-of-

96 Where a rural ILEC ("RLEC") not otherwise subject to sections 251(b) or (c), pursuant to section 251(f), requests negotiation of a competitive provider, then the RLEC should be deemed to have voluntarily submitted to the obligations of sections 251(b)(5) and 252(c)(2) consistent with the scope of the request. RLECs cannot be allowed to attempt to reap the benefits of the statutory scheme without also being required to accept to corresponding obligations, should the CLEC assent to such negotiations.

return ILECs participate in the traffic sensitive pool managed by the National Exchange Carrier Association ("NECA"), where their access rates ("NECA rates") are based on projected aggregate costs and demand of all pool members and are targeted to achieve the authorized rate of return.[97] Because each ILEC receives a pro-rata share of the profits, the Commission suggests that there may be less incentive to engage in access stimulation arbitrage because the benefits would be shared among the pool;[98] however, because these ILECs may still recover additional revenues, arbitrage incentives are by no means eliminated, especially if multiple ILECs in the pool engage in access stimulation activities without adjusting their projected demand accordingly.

Rather than joining the NECA pool, an ILEC may file its own interstate access tariff based on its individual projected costs and demand pursuant to section 61.38 or based on its individual historical costs and demand pursuant to section 61.39.[99] To the extent that demand increases above the rate-of-return ILEC's projected or historical demand, the ILEC is permitted to earn above the targeted percent return because its tariffed rates have been deemed presumptively reasonable pursuant to the Commission's streamlined tariffing rules. As the Commission is aware, because the ILEC is able to retain all of this additional revenue even when its actual rate of return is proven to be higher than the authorized rate, there is significant incentive for these rate-of-return ILECs to stimulate access traffic.[100]

Similarly, CLECs that are permitted to mirror these ILEC rates have incentives to increase access demand by targeting customers with high volumes of inbound calling, and, in

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[97] *NPRM* ¶ 645.

[98] *NPRM* ¶ 662.

[99] 47 CFR §§ 61.38 & 61.39.

[100] *NPRM* ¶ 648.

fact, many LECs have developed business plans based entirely on these arbitrage opportunities. Pursuant to section 61.26(b), a CLEC is prohibited from tariffing interstate access rates above those of the competing ILEC.[101] This rule simplifies the tariff requirements for CLECs while also establishing a rate cap for CLEC access services. To the extent that a CLEC provides service in non-rural areas, its tariffed access rates would generally be established based on the rates of the competing RBOC or price-cap ILEC serving the same area. However, if a CLEC competes in a rural area with a rate-of-return ILEC, a CLEC may tariff access rates as high as those of the rate-of-return ILEC, regardless of the CLEC's actual costs or demand in that rural area. Furthermore, certain rural CLECs may file tariffs pursuant to the rural exemption whereby they are permitted to benchmark to the higher NECA rates even when competing against a non-rural ILEC.[102] Because of this, many access stimulation arbitrage schemes are targeted to rural geographic areas where the CLEC is permitted to charge significantly higher access rates, despite its minimal costs of operation to serve a few high volume customers in addition to whatever other customers it may have.

C. The Commission's Remedy Is Narrowly-Tailored To Meet Its Goal Of Addressing Arbitrage Without Burdening Other Carriers.

XO strongly supports the Commission's "goal of providing a targeted response to address access stimulation while minimizing additional burdens on LECs not engaged in access stimulation."[103] In particular, XO commends the Commission's targeted focus on those LECs that abuse the rate-of-return access system to establish high access rates based on low historical or projected demand and then target customers to increase their access traffic volumes without likewise decreasing their access rates. When these LECs

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[101] 47 CFR § 61.26(b).

[102] 47 CFR § 61.26(e).

[103] *NPRM* ¶ 658.

experience a significant increase in demand and their higher access rates generate a rate of return significantly higher than the authorized return rate, their rates and practices take advantage of the access charge rules developed for low volume rural LECs ("RLECs")... Therefore, requiring these LECs to decrease their access rates to those of the competing RBOC or largest ILEC in the state provides a narrowly-tailored remedy focused explicitly on those practices that advantage one carrier over another.

XO urges the Commission, however, to ensure that any rule changes explicitly apply only to ILECs or CLECs that do not already benchmark their access rates to the BOC or largest ILEC in the state. While discussion in the NPRM is undeniably focused on the egregious behavior of some of these rate-of-return ILECs and rate-of-return benchmarking CLECs, the text of the Commission's proposed rule is not so clearly limited to these CLECs. XO submits that the Commission's proposed rule should be modified so that it may not be interpreted to impose any additional burdens on CLECs that already benchmark to the tariffed rate of the RBOC or the largest ILEC in the state.

Modifying the language as indicated below would explicitly apply this remedy only to those carriers with opportunities for setting and imposing unjust and unreasonable rates on other carriers:

> **<u>§ 61.3 Definitions</u>**
>
> (aaa) *Access revenue sharing*. Access revenue sharing occurs when any LEC whose tariffed interstate access rates exceed the rates charged by the largest price-cap ILEC in the same state enters into an access revenue sharing agreement that will result in a net payment to the other party (including affiliates) to the access revenue sharing agreement over the course of the agreement. A LEC meeting this trigger is subject to revised interstate access charge rules.[104]

[104] NPRM Appendix A.

The above modification will avoid any confusion as to the intended targets of this rule and eliminate opportunities for other carriers to contest the assessment of tariffed rates of CLECs that already benchmark the rates of the RBOC or largest price-cap ILEC.

D. While Not *Per Se* Unreasonable, The Existence of Revenue-Sharing Agreements Often Signals Unreasonable Access Rates When Employed By Rate-Of Return ILECs And Rate-Of-Return Benchmarking CLECs.

XO strongly supports the Commission's conclusion that revenue sharing agreements are not *per se* unreasonable under section 201 of the Act.[105] The existence of traffic imbalances or high traffic volumes is not inherently unreasonable, nor is a marketing or commission arrangement that generates higher traffic volumes. As the Commission is aware, high call volumes may be naturally generated by legitimate businesses and customers, such as call centers and business conferencing services. Thus, the Commission should reject any proposal that would prohibit a LEC from assessing tariffed access charges on traffic subject to a revenue sharing agreement. Such a prohibition would be tantamount to treating such agreements as *per se* unreasonable by penalizing a LEC, regardless of the LEC's access rates themselves. Conversely, the Commission's proposed remedy is narrowly tailored to reduce rates to a more appropriate benchmark based on that LEC's access demand.

Moreover, XO opposes any requirement that a LEC negotiate with individual interexchange carriers ("IXCs") to determine the rates applicable to such traffic since such a process is highly likely to lead to industry disputes or an impasse. An IXC has very little incentive to actually negotiate a rate since it can simply refuse to do so and avoid paying access charges until the LEC files a complaint with the Commission. Rather than risk further industry uncertainty and create opportunities for IXCs to game the process, the Commission should adopt

[105] NPRM ¶ 661.

its proposed rule that places the onus on the LEC to file an updated tariff if it enters into a revenue sharing agreement.[106]

Under the Commission's current rules, there is little opportunity for an aggrieved IXC to successfully challenge a rate-of-return LEC's excessive rates. Due to the logistics of access billing, especially between carriers interconnected indirectly via the ILEC access tandem, IXCs often unknowingly incur significant access charges before they are billed by a rate-of-return LEC that has engaged in access stimulation. Thus, the IXC (or other billed party) is burdened with strictly monitoring access bills to assess whether a rate-of-return LEC may be engaging in traffic stimulation. Moreover, because the LEC's tariffed rates have been deemed reasonable unless previously contested, an IXC is severely limited in its right to receive refunds for paying excessive and unreasonable access charges.

Adoption of the Commission's proposal would appropriately shift the burden to rate-of-return LECs or rate-of-return benchmarking CLECs to proactively adjust their rates before billing an IXC at unreasonably high rates. Additionally, the Commission should adopt its proposal to prohibit a rate-of-return ILEC from including revenue sharing payments in its recoverable access cost calculation as this is an unreasonable practice that violates section 201(b).[107] Any payments under a revenue sharing agreement are not direct access costs that should be included in a rate-of-return ILEC's rate justification analysis.

Put simply, while revenue sharing agreements are not inherently unreasonable, the existence of such an agreement should serve to nullify reliance on a rate-of-return ILEC's projected demand (assuming it was calculated without consideration of the agreement) and also renders any reliance on historical demand moot. Because either projected or historical demand is

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[106] NPRM ¶ 659.

[107] NPRM ¶ 661.

a significant factor in justifying a rate-of-return ILEC's higher access rates, either by individual tariff or within the NECA pool, those rates must be adjusted to account for now anticipated increases in access demand. Otherwise, the rate-of-return ILEC's rates may be presumed to be *unreasonable* and the "deemed lawful" status of its tariff should be revoked, as the Commission proposes.[108] Similarly, it is unreasonable for a CLEC to benchmark to the higher access rates of a rate-of-return ILEC or to the NECA rates when it knowingly engages in access stimulation that minimize its resemblance to the rate-of-return ILEC for purposes of benchmarking rates. When the CLEC's call volumes (or anticipated volumes as a result of the revenue sharing agreement) do not roughly mirror the volumes of the rate-of-return ILEC, the CLEC benchmarking to that ILEC's rates is unsupportable; therefore, under the rules the Commission adopts in this proceeding, the "deemed lawful" status of the CLEC's tariff (for the period before it is modified pursuant to the new rule) should similarly be revoked.

E. Adequate Detection and Enforcement May Require Revoking "Deemed Lawful" Status of Rate-Of Return ILECs' And Rate-Of-Return Benchmarking CLECs' Tariffs in Other Circumstances Not Involving Revenue Sharing Agreements.

XO submits that any exploitation of the rate-of-return access system and the rural exemption is a practice that the Commission should restrain under any rules adopted in this proceeding. The existence of a revenue sharing agreement employed by a rate-of-return ILEC or a rate-of-return benchmarking CLEC is a clear signal of future increases in access demand; however, there may be other circumstances where a rate-of-return ILEC or rate-of-return benchmarking CLEC has increased traffic volumes without engaging in a revenue sharing agreement. In other words, arbitrage opportunities and incentives exist particularly because of the rate disparity between the rate-of-return access system and the price-cap access system. A

[108] NPRM ¶ 666.

LEC that targets customers with predominantly inbound calling patterns could generate significant volumes that lead to excessive revenues beyond the authorized rate of return. The Commission should proactively adopt additional measures to ensure the next generation of arbitrage schemes does not arise.

XO proposes that the Commission adopt a rebuttable presumption that increases in access volumes of more than 100 percent in a six month time period would automatically revoke, for the period contemporaneous with and following the increase, the "deemed lawful" status of a LEC whose interstate tariffed rates are above those of the BOC or largest ILEC in the state until reviewed by the Commission. This threshold has been reviewed and adopted by the Iowa Utilities Board ("IUB") in triggering its rules regarding high volume access services.[109] While XO does not agree that the remedy adopted by the IUB is appropriate for FCC adoption, XO does believe that a trigger based on traffic volumes is appropriate. This would allow other carriers to easily detect which LECs may have met the revenue sharing trigger but have not adjusted their tariffed rates accordingly. Moreover, adoption of this rebuttable presumption would curb a LEC's incentive to search for other arbitrage opportunities because it could not legally assess its tariffed rates if its access volumes increased significantly.

In short, the rate-of-return access system and the rural exemption allow smaller LECs to reduce the costs of tariffing access rates and to assess higher rates than the larger price cap LECs in order to balance the presumably smaller traffic volumes typical in rural markets. This concession granted to smaller carriers should be considered a privilege; however, many of the offending rate-of-return LECs and rate-of-return benchmarking CLECs consider it a right to profit unreasonably from other carriers by configuring their business plans expressly to exploit

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[109] *High Volume Access Service,* Docket No. RMU-2009-0009, 2010 WL 2343199 (Iowa Utils. Bd. 2010).

higher access rates arguably made possible under the current rules. The Commission must diligently monitor those carrier's rates and practices to ensure that they cannot wantonly abuse the system to gain advantage over other carriers, and if a rural or smaller LEC abuses the rate-of-return access system, the Commission should not hesitate to revoke its privilege.

VI. FCC SHOULD MODIFY SECTION 20.11(E) TO REQUIRE CMRS PROVIDERS TO NEGOTIATE WITH CLECS FOR INTERCONNECTION AND ESTABLISH AN INTERIM DEFAULT RATE THAT WILL APPLY FOR CLEC-CMRS COMPENSATION ARRANGEMENTS.

The Commission should not take the bait offered by CMRS providers to permit them to shirk their obligation to pay reciprocal compensation under section 20.11. As discussed above, traffic subject to revenue sharing agreement should not be excluded from intercarrier compensation arrangements. If the Commission finds that carriers are abusing the reciprocal compensation system, it should consider adopting a presumption similar to its rules regarding ISP-bound traffic, where the reciprocal compensation rate for out-of-balance traffic beyond a particular threshold may be capped at a lower rate. However, the Commission should not adopt any policy that would restrict a CLEC from assessing intercarrier compensation pursuant to 20.11 unless an agreement is signed by the parties.

XO urges the Commission to affirm that these CMRS providers have a duty to pay compensation separate and apart from any duty to negotiate an agreement. In addition, the Commission should modify section 20.11(e) to require CMRS providers to negotiate with CLECs as well as ILECs. XO has earnestly sought to reach mutually agreeable arrangements with numerous CMRS providers that have refused to negotiate a compensation agreement, arguing they are not obligated to do so under section 20.11(e). Because of the CMRS providers' unwillingness to consider entering into an agreement to pay *any* compensation for the termination of their intra-MTA traffic, XO has been left with no choice but to directly invoice these providers pursuant to section 20.11. Section 20.11 on its face does not require that any particular compensation arrangement exist in order to effectuate a CMRS provider's payment obligation:

> A commercial mobile radio service provider *shall pay reasonable compensation* to a local exchange carrier in connection with terminating traffic that originates on the facilities of the commercial mobile radio service provider.[110]

Therefore, the Commission should authorize the application of termination charges under section 20.11 without an agreement, given that section 20.11 contains a direct duty to pay compensation, rather than a duty to merely enter into a compensation arrangement, as required by section 251(b)(5).[111] Furthermore, in the recent *North County* decision, the Commission stated that a LEC could seek resolution of its claim regarding a violation of section 20.11 if a CMRS provider failed to pay what was owed pursuant to a state-approved rate.[112] The Commission did not predicate this resolution on the existence of a compensation arrangement between the carriers; therefore, the Commission should follow this reasoning and find that a CMRS provider's refusal to pay a state-approved rate violates section 20.11.

Additionally, the Commission should adopt interim rates or methodology that would apply until an agreement is reached or a state commission has specifically established a compensation rate for CMRS traffic. XO submits that the ILEC reciprocal compensation rate should apply as a proxy rate because the Commission has found the ILEC rate is a presumptively reasonable rate for other carriers. Instead of spurring state commissions to quickly adopt a

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110 47 C.F.R. § 20.11(b)(2) (emphasis added).

111 *North County v. MetroPCS*, 24 FCC Rcd at 3814, n.55 ("We make no determinations at this time as to whether rule 20.11 imposes obligations to pay compensation in the absence of an agreement, and if so, on what terms, or alternatively, whether the obligation under rule 20.11 is a mandate that the parties must enter into an agreement to a reasonable rate of mutual compensation").

112 *Id.* at 3811, ¶ 9.

reasonable rate, the appeal of the Commission's *North County* decision has stalled certain state proceedings, led to further protracted disputes between LECs and CMRS providers, and resulted in the continued unjust enrichment of CMRS providers who refuse to pay reasonable compensation for termination of intra-MTA traffic, especially where there is a traffic imbalance in their favor. The Commission's confirmation that the ILEC reciprocal compensation rate is a presumptively reasonable rate in the absence of a negotiated or state-approved CMRS rate would not act to preempt any state commission from determining a reasonable rate based on a cost proceeding or any other mechanism. But rather, consistent with section 20.11(c) and the Commission's reciprocal compensation provisions, the ILEC reciprocal rate would operate as the symmetrical rate where a state commission has not yet determined a specific rate for CMRS traffic.

In determining the ILEC reciprocal compensation rate under section 252(d)(2), a state commission may "determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls" but may not "engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls."[113] Therefore, even in reviewing an ILEC's cost data, a state commission may use a reasonable approximation of costs. Surely the FCC did not intend that a state commission should determine the costs and rates of competitive carriers with more particularity that those of an incumbent carrier with market power. In establishing the ILEC reciprocal compensation rate as a presumptively reasonable proxy for competing carriers, the Commission reasoned that "[b]oth the incumbent LEC and the interconnecting carriers usually will be providing service in the same

[113] 47 USC § 252(d)(2)(a)(ii) and (b)(ii).

geographic area, so the forward-looking economic costs should be similar in most cases."[114] Therefore, the ILEC reciprocal compensation rate provides an appropriate proxy for a termination rate for CMRS-CLEC traffic.

CONCLUSION

For the forgoing reasons, XO respectfully requests that the Commission reform its access charge rules in a manner consistent with the proposals contained herein.

Sincerely,

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[114] *Local Competition Order*, 11 FCC Rcd at 16040, ¶ 1085.